IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-880

TRANS WORLD AIRLINES, INC.,
Cross-Petitioner,

v.

HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY,
Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

CLARK M. CLIFFORD
THOMAS D. FINNEY, JR.
CLIFFORD, WARNKE, GLASS,
McILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

CHESTER C. DAVIS
MAXWELL E. COX
DAVIS & COX
120 Broadway
New York, New York 10005

Attorneys for Respondents

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-830

TRANS WORLD AIRLINES, INC.,

Cross-Petitioner,

v.

HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY,

Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Trans World Airlines, Inc. ("TWA") has filed a cross-petition, asking that if this Court grants the petition for certiorari, No. 71-827, filed by Hughes Tool Company ("Toolco") and Raymond M. Holliday (together "defendants") that it also consider certain additional issues tendered by TWA.

Defendants' petition presents issues of recurring importance in the conduct of civil litigation in the federal courts. TWA's cross-petition raises issues that it correctly describes as "peripheral to the basic controversy" (Cross Petition 24) and that are either of no general significance or controlled by long-established precedents. Basically

TWA's complaint is that the judgment for $145,448,141.07 that it has received is inadequate and that it should have received more—more interest, more costs, and more treble damages.

A.

The essential facts about the proceedings below are set out in defendants' petition. The Statement of the Case in the cross-petition is misleading in several respects that deserve comment.

1. TWA states (Cross Petition 7) that the fact that Toolco included in its answer a derivative counterclaim on behalf of TWA establishes that TWA was seriously injured and that these injuries resulted from violations of the antitrust laws. The statement will not withstand analysis.

The counterclaim alleged a violation of the antitrust laws based on a conspiracy among lending institutions and others to seize control of TWA for their own purposes. Among the acts alleged in furtherance of this conspiracy was the ordering of more jet aircraft than TWA needed or could afford. Clearly a claim that TWA has been injured by ordering too many jets is not an admission that it was injured by having too few jets. Equally clearly, a claim that the antitrust laws were violated by the conspiracy of the lenders and others to seize control has no relevance to whether defendants violated the antitrust laws in the decisions they made in the exercise of their CAB-approved control of Toolco's subsidiary.

2. TWA erroneously characterizes statements made by counsel for defendants at the time they gave their Notice of Position as "an express acknowledgment of [defend-

ants'] liability in damages if the several jurisdictional grounds on which they were seeking appellate review were determined against them'' (Cross Petition 10). The statements quoted by TWA in no way support the conclusion TWA seeks to draw from them because ''liability in damages'' cannot be separated from ''damages for what?'' Defendants do not question that, if they were wrong in their view of the applicable law, they would be liable in damages for injuries proximately caused by conduct constituting a tie-in, boycott, or attempt to monopolize. They have never agreed that they would be liable for conduct that did not violate the antitrust laws nor for injuries that did not result from any violation of the antitrust laws.

3. TWA ends its Statement of the Case with a table showing the length of time that various phases of this litigation have taken (Cross Petition 14). Defendants agree that a tragic amount of time has been spent on this case by the courts as well as the litigants. This waste of time has been quite unnecessary. This case would have ended years ago had TWA been willing to define the issues and to reveal the factual basis of its claim in a Rule 16 proceeding as urged by Special Master Rankin. It is hardly Toolco's fault that TWA successfully resisted the efforts of the Special Master to speed progress in this case or that TWA was able to conceal until the damage hearing the fact that the injury for which it claimed damages had no conceivable connection with the violations of the antitrust laws it had alleged.

B.

TWA is not satisfied with interest at the rate of 7½% from the date of the judgment. It claims that interest should have started to run before the judgment was entered.

The Second and Seventh Circuits are clearly right in saying that where treble damages are awarded, moratory interest has no place in the computation of damages. One may admire the ingenuity with which TWA seized one sentence in the opinion of this Court in *Thomsen* v. *Cayser*, 243 U.S. 66 (1917), describing the award below as including interest, and a holding in *United Mine Workers* v. *Coronado Coal Co.*, 258 Fed. 829 (8th Cir. 1919), *reversed on other grounds*, 259 U.S. 344 (1922), that a judge may not award interest if the jury has not done so, as a basis for claiming that a conflict exists. The fact that TWA can find no better authority for its position than two cases more than 50 years old, in one of which moratory interest was not awarded and in the other of which the propriety of awarding such interest was not discussed, is a clear indication that for more than a half century courts have not included moratory interest in treble damage awards.

This would be an inappropriate case in which to reexamine this longstanding practice. As the Court of Appeals recognized, the award of moratory interest would give rise to difficult questions of proof, "including highly obstruse inquiries as to proper rates and the time from which interest should run" (App. 159a). The peculiar facts, or lack of facts, in this case would compound the problem. The holding below was that there was no need to show "that any of Toolco's acts pleaded in the complaint violated the antitrust laws nor to show that those acts caused the well-pleaded injuries" (App. 139a). To try to determine when moratory interest might properly be awarded would be impossible in a miasma where both cause and effect are lacking.

TWA claims in the alternative that it should have received interest from the date of the report of the Special Master, rather than from the date of the judgment. Its

novel claim ignores "the plain words of Section 1961" (App. 160a), it ignores the view of the Court of Appeals that the reference served to expedite the litigation, and it ignores the fact that defendants did not request the reference and should not be penalized because of it.

C.

TWA argues that in addition to costs and attorneys' fees of $7,836,705.12 awarded it by the District Court, it should receive an additional $1,642,677.71 to reimburse it for payments made to experts who testified for it at the damage hearing. It contends that Section 4 of the Clayton Act, which allows recovery of "cost of suit, including a reasonable attorney's fee," really means "cost of suit, including not only a reasonable attorney's fee but also any other expenses incurred that would not otherwise be taxable as costs." The simple answer to this contention is that the statute does not say what TWA would have it say. If Congress had meant to include payments to expert witnesses and the like as part of the cost of suit, it would have said so. What TWA concedes to be "a long and uniform line of decisions" (Cross Petition 20) have read the statute naturally and rejected the claim now made. Nor is this case, in which the Special Master rejected in whole or in part the testimony of all of the major expert witnesses that TWA produced, an apt vehicle for reconsidering what has come to be accepted law.

D.

TWA's final claim is that it should have been awarded an additional $19.5 million because the courts below should have assumed that TWA would have financed the hypotheti-

cal fleet of jets, on which it based its damage claims, at the interest rates prevailing in 1955 and 1956 instead of at the rates prevailing in 1958-1960 when the hypothetical fleet, according to TWA, would have been delivered. Even TWA is unable to explain what question of wide application is presented by whether the Special Master should have used one interest rate or another as the "cost of capital." The question may be novel but it depends solely on the particular facts of this case. Moreover, the assumption that long before the planes were to be delivered TWA would have raised the vast sums required to pay for them is quite remarkable. That TWA can advance such an assumption only emphasizes that damages were awarded without any showing that TWA could at any time have financed the hypothetical jet fleet.

CONCLUSION

The cross-petition should be denied.

Respectfully submitted,

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

CLARK M. CLIFFORD
THOMAS D. FINNEY, JR.
CLIFFORD, WARNKE, GLASS,
McILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington D.C. 20006

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington D.C. 20006

CHESTER C. DAVIS
MAXWELL E. COX
DAVIS & COX
120 Broadway
New York, New York 10005

Attorneys for Respondents